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No. 70-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. [redacted]

ALBERT SARNO AND CHRIS CARDI,
Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITIONERS' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 565

ALBERT SARNO AND CHRIS CARDI,
Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITIONERS' BRIEF.

OPINION BELOW.

The opinion of the Illinois Supreme Court is reported at 45 Ill. 2d 473 (1970) and printed at A.* 53-56.

JURISDICTION.

The statutory provision covering jurisdiction to review the judgment is Title 28, Section 2101 (c) United States Code Annotated.

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*A. refers to Appendix under Rule 36.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fifth Amendment to the Constitution of the United States, (A)* 1.

Article II Section 10, Illinois State Constitution, (A) 1.

1967 Illinois Revised Statutes:

Chapter 38, Sections 203-1, 203-10 and 203-14, (the latter statute is referred to as the Immunity Act) (A) 1-3;

Chapter 38, Sections 106-1 and 106-2, (referred to as the Grand Jury Act) (A) 3;

Chapter 77, Sections 4, 5 and 68, (A) 4, 5.

1965 Illinois Revised Statute:

Chapter 38, Section 39-1, 39-2 (Criminal Usury), (A) 3.

MISCELLANEOUS STATUTES.

1967 Illinois Revised Statutes:

Chapter 5, Section 158, Marketing Fresh Fruits and Vegetables;

Chapter 48, Section 501, On Employment Compensation;

Chapter 67½, Section 173, State Housing Act;

Chapter 67½, Section 278, Neighborhood Redevelopment Corp. Act;

Chapter 100½, Section 4, Public Nuisance (Prostitution);

Chapter 111⅔, Section 65, Public Utilities, (A) 6-9.

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* (A) refers to Appendix to Brief under Rule 40.

QUESTIONS PRESENTED.

1. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

2. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

3. Subsidiary question necessarily involved; under a claim Immunity Act, can the State, with reference to future state prosecution, supplant the privilege when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

STATEMENT OF THE CASE.

In 1963, the Illinois Legislature created the Illinois Crime Investigating Commission whose sole purpose was to investigate organized crime in Illinois, Chapter 38, Sections 203-1 to 203-17. The pertinent part of Section 203-14, referred to as the Immunity Act, is as follows:

> "*. . . that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or* produced evidence."

The Immunity Act is a claim immunity statute.

On this occasion the Commission was investigating the "juice loan" or "loan shark" racket.

On February 8, 1968, the presiding judge in the Circuit Court of Cook County entered an order requiring petitioners to appear before the Illinois Crime investigating Commission, A. 3, R. 78-84. On February 24, 1968, petitioners appeared before the Commission and refused to answer questions pleading the Fifth Amendment.

On March 21, 1968, the Commission filed a motion in the Circuit court, attaching a copy of the questions the petitioners refused to answer, and moved the court to enter an order, pursuant to Sections 203-14, directing the petitioners to appear before the Commission and answer the questions, and also requested the court to enter an express order releasing petitioners from all liability to be prosecuted or punished on account of any matter to which they shall testify before the Commission, A. 18, R. 86-90.

Petitioners filed a motion to dismiss or in the alternative to strike the foregoing motion, A. 19-22, R. 144-149. On April 22, 1968, the Commission filed a reply to petitioners' motion to dismiss, A. 22, R. 156-176. On July 26, 1968, peti-

tioners' motion to dismiss or in the alternative to strike was denied, A. 23, R. 181.

On January 30, 1969, the court entered an order directing the petitioners to reappear before the Commission and answer the questions previously propounded to them and entered an express order releasing them from all liability to be prosecuted or punished on account of any matter to which they shall testify before the Commission, A. 23, 24, R. 218-245. Pursuant to this order, petitioners appeared for the second time before the Commission on the 28th day of February, 1969, and still refused to answer the questions pleading the Fifth Amendment. Each of the questions asked of Cardi is reprinted at A. 24-39, R. 245-265. Each of the questions asked of Sarno is reprinted at A. 39-51, R. 272-287. The questions asked of Cardi are grouped and summarized at Pet. Br. 12-14. The questions asked of Sarno are grouped and summarized at Pet. Br. 12-14.

On April 7, 1969, the court entered a rule to show cause on Cardi and Sarno as to why they should not be held in contempt of court for failing to comply with the previous order, A. 51-52, R. 304-308, and on May 6, 1969, petitioners filed a verified answer to the rule to show cause, A. 52, R. 308-314. On May 9, 1969, petitioners were found in contempt of court and sentenced to serve a period of six months in the County Jail, A. 52, R. 320-328.

The decision of the trial court was affirmed by the Illinois Supreme Court. The Illinois Supreme Court held that there was no authority for the trial court to enter an express order of immunity, but that the immunity referred to in Section 203-14 was coextensive with the Fifth Amendment, citing *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52.

SUMMARY OF ARGUMENT.

The provisions of the Immunity Act do not supplant the privilege.

At the time of the compelled testimony, the Immunity Act, using phraseology found in no other Illinois immunity statute, had not been interpreted by the Illinois courts as being sufficient to supplant the privilege, and petitioners could not look to the Illinois State Constitution.

Illinois uses two different standards; that is, (1) when a person testifies before the Grand Jury or in a court of record, pursuant to Chapter 38, Section 106-1 and Section 106-2 (referred to as the Grand Jury Act), he is testifying pursuant to provisions found adequate to supplant the privilege in *People* v. *Walker*, 28 Ill. 2d 585, 590; however, (2) when a person testifies before the Illinois Crime Investigating Commission, whose sole duty is to investigate organized crime, he is testifying under conditions where the statute, on its face, does not supplant the privilege.

The Illinois Legislature intended that two different standards be used; approximately two years after the provisions of the Grand Jury Act were found adequate in the *Walker* case, the legislature amended the Immunity Act but did not change the phraseology of the necessary provisions in the Immunity Act to comply with the decision in the *Walker* case. Further, this failure on the part of the legislature violated the federal standard of "fundamental fairness."

The failure of the Illinois Legislature to include any rules for discovery in criminal cases, violates a person's rights under the Sixth Amendment and violates the federal standard of "fundamental fairness"—in any subsequent prosecution, a person would be unable to ascertain whether or not the subsequent prosecution was based on the "fruits"

or "links" of the compelled testimony nor even reply to any contention of the state that the subsequent prosecution is based on "independent evidence."

The failure of the Immunity Act to include the phrase "or subjected to penalty or forfeiture," in a state where a person can go to jail for failure to pay judgments where "malice is the gist of the action" pursuant to 1967 Ill. Rev. Stat., Chapter 77, Sections 4, 5 and 68, is a failure to include provisions as broad in scope as the Fifth Amendment.

Inasmuch as the basic purpose behind the privilege lies in the integrity of the government, *Tehan* v. *Shott*, 382 U. S. 406, 415, and represents a moral striving of the community, *Malloy* v. *Hogan*, 378 U. S. 1, 9, a state must affirmatively demonstrate to a person, when testifying pursuant to the Illinois Immunity Act, that an immunity as broad in scope as the Fifth Amendment is available and applicable to them—the foregoing is not related to the special facts and circumstances found in *Stevens* v. *Marks*, 383 U. S. 234, 244—it applies where the statutes and procedures in a state violate the federal standard of "fundamental fairness."

ARGUMENT.

I.

ASSUMING THE IMMUNITY STATUTE WAS NOT AS BROAD AS THE FIFTH AMENDMENT, AS FAR AS FUTURE STATE PROSECUTIONS ARE CONCERNED, MAY A PERSON PLEAD THE FIFTH AMENDMENT WHEN IT IS EVIDENT, FROM THE IMPLICATION OF THE QUESTIONS IN THE SETTING IN WHICH THEY ARE ASKED, THAT RESPONSIVE ANSWERS TO THE QUESTIONS MIGHT BE DANGEROUS BECAUSE INJURIOUS DISCLOSURE COULD RESULT IN FUTURE STATE PROSECUTIONS?

Illinois Law.

In Illinois an immunity statute to be valid must afford absolute immunity against future prosecutions for the offense to which the question relates and thus follows the language in *Counselman* v. *Hitchcock,* 142 U. S. 547, 586, and cases cited therein. *People* v. *Newmark,* 312 Ill. 625, 632, 633 (1924)—

> ". . . but if the proposed evidence has a tendency to incriminate the witness or to establish a link in the chain of evidence which may lead to his conviction, or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense, he cannot be compelled to answer. (*Minters* v. *People,* 139 Ill. 363; *Lamson* v. *Boyden,* 160 id. 613; *People* v. *Argo,* 237 id. 173; *Counselman* v. *Hitchcock, supra*) . . . We are clearly of the opinion that no statute which leave the witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the constitutional guaranty. We are supported in this conclusion by the following among other authorities: *Counselman* v. *Hitchcock, supra; People* v. *Argo, supra; Emery's case,* 107 Mass. 172; *Cullen* v. *Commonwealth,* 24 Gratt. 624."

Illinois Constitution.

"Section 10 of article II of the Illinois constitution provides that 'No person shall be compelled in any criminal case to give evidence against himself.' No substantive difference appearing between this provision and the like provision in the fifth amendment to the United States constitution, the provisions may be construed alike and United States Supreme Court decisions construing the fifth amendment are authoritative in construing the similar provision of our constitution (*People* v. *Grod,* 385 Ill. 584)." *Halpin* v. *Scotti,* 415 Ill. 104, 107 (1953). Yet "Where it is sought by statute to authorize the courts to grant immunity to material witnesses, a construction must not be placed upon the immunity statute which will abridge the constitutional privilege of silence." *People* v. *Newmark,* 312 Ill. 625, 632. "In consideration of such statutes the test is whether the immunity becomes a complete substitute for the constitutional privilege. Legislation cannot abridge this constitutional privilege, but the statute must be so broad as to have the same scope and effect." *People* v. *Boyle,* 312 Ill. 586, 597 (1924).

Standards and Interpretations.

Illinois uses two different standards. A witness, when appearing before the Grand Jury or at a trial in a court of record pursuant to Chapter 38, Section 106-1 and Section 106-2, Ill. Rev. Stat. 1967 (hereinafter called the Grand Jury Act), is granted immunity "from prosecution *for any offense* shown in *whole or in part* by such testimony." Section 106-2 of the Grand Jury Act enacted August 18, 1963, is as follows:

> "Effect of Immunity.) Such order of immunity shall forever be a bar to prosecution against the witness *for any offense* shown in *whole or in part* by such

> testimony or other evidence except for perjury committed in the giving of such testimony." (Emphasis supplied.)

The language in the Grand Jury Act is taken from its predecessor, Chapter 38, Section 714.1, Ill. Rev. Stat. 1961. The pertinent language of the latter statute was "and such order shall forever after be a bar to any indictment, information or prosecution against the witness for any felony or misdemeanor *shown in whole or in part by such testimony.*" (Emphasis supplied.) The latter statute was interpreted by the Illinois Supreme Court in *People* v. *Walker*, 28, Ill. 2d 585, 590 (1963)—"the statute eliminates the constitutional provision against self-incrimination by a grant of immunity that bars prosecution of the witness for any offense '*shown in whole or in part* by such testimony.' " (Emphasis supplied.) At the present time, therefore, under Illinois law, the Grand Jury Act is sufficient to supplant the privilege.

When, however, a witness is testifying pursuant to Chapter 38, Section 203-14, Ill. Rev. Stat. (1967) (hereinafter referred to as the Immunity Act) before the Illinois Crime Investigation Commission, whose sole purpose is to investigate organized crime, a different standard is used. The pertinent part of Section 203-14 of the Immunity Act provides as follows:

> "that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, *he gave answer.*" (Emphasis supplied.)

Further, on August 24, 1965, about two years after the *Walker* case and the enactment of the Grand Jury Act, Section 203-14 of the Immunity Act was also amended, but the pertinent language stated above was untouched. This is a clear indication that the legislature had no intention

to grant to a witness an immunity sufficient to supplant the privilege found adequate in *Walker*. Additionally, at the time petitioners testified, the Illinois Supreme Court had not interpreted the Immunity Act. When it did so, on this appeal, the Illinois Supreme Court (A. 55, 56) referred to the decision in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, as authority for the Immunity Act being sufficient to supplant the privilege. Petitioners' position is that the *Murphy* case refers only to the situation of a person testifying in a state setting who fears federal prosecution.

The privilege embraces those answers which would furnish a link in the chain of evidence needed to prosecute, *Hoffman* v. *United States*, 341 U. S. 479, 486; *Malloy* v. *Hogan*, 378 U. S. 1, 14.

Petitioners were examined with reference to over one hundred juice collections from 1963 to 1966 (A. 28, q. 11). And further questions could lead only to the conclusion that these offenses were being committed up to the time petitioners testified, February 28, 1969. By conservative estimate, the examination referred to over two hundred transactions (criminal usury was made an offense on August 10, 1965, 1965 Ill. Rev. Stat., Chapter 38, Section 39-1) (A) 3. They were questioned in a background referring to their arrest for kidnaping, assault and robbery of one Joseph Weisphal; their arrest for theft for interstate shipments; they were referred to as enforcers; that they had made certain threats and allegations to the mother of one of the juice customers; that Sarno was present when Messino threatened a juice customer with a baseball bat; that three of the customers left Chicago in order to avoid the petitioners; and in such a context as to show that they had used "terror tactics" in collecting the juice loans; but were examined with reference to only a small percentage of the specific transactions. The questions of Cardi com-

mence at Appendix 24 and those of Sarno at Appendix 39, and the questions have been numbered for reference.

Suppose petitioners had been asked only one question (A. 42 q. 12)—"At what places in Cook County have your juice customers met you to make their weekly payments?" and petitioners "gave answers" to the questions. Assume then that the state went to these centers, interviewed the customers, learned from them that petitioners had committed any one of the offenses of violence punishable under the Criminal Code, whether committed against them or another customer known to them. Petitioners were not asked to give answer to an act of violence. Nevertheless, the answer to the question would be the "link" necessary to prosecute for an offense of violence, and the Immunity Act does not cover "links" or "fruits."

The questions as to Cardi and Sarno fall in certain categories—

Group I—Specific Juice Transactions.

Cardi.

q. 15, Mr. Boyd; q. 30, a person known as "Doc;" q. 31, 32, Bruce Carman; q. 33, 34, Charles Tabbert; q. 42, Mr. White; q. 48, 49, 50, 51, 52, Ray Finnerman.

Sarno.

q. 13, Mr. White; q. 14, 15, 16, 17, Mr. Black; q. 18, 19, 20, 21, 22, Mr. James; q. 29, Ed Back; q. 30, 31, Larry Greenbaum; q. 32, 33, Philip Marzarello; q. 34, George and Peter Menenexis; q. 38, Dave Wasserman.

Group II—The Centers of Activities.

Cardi.

q. 21, 22, Moon's Sandwich Shop; q. 23, 24, 25, Mr. Lucky's Tavern; q. 26, 27, Chicago Linoleum and Tile Company; q. 28, Stefano's Restaurant.

Sarno.

q. 16, Mr. Lucky's Tavern; q. 24, Red Steer Restaurant; q. 25, Sam and Sleepy's Tavern.

Group III—Business Acquaintances and Hangouts.

Cardi.

q. 16, 17, Yogi Bear Drive-ins, Bruce Carman and Leo Netzel; q. 40, has been frequenting Bar Nazionale; q. 45, Fiori Bucciere; q. 46, Frank Bucciere.

Sarno.

q. 35, Mike Castaldo; q. 36, Joe Donzanelli.

Group IV—The Higher-Ups.

Cardi.

q. 6, Messino; q. 7, Gagliano; q. 8, Jackie Cerone; q. 9, Cerone and Messino; q. 10, Joe Gagliano; q. 13, how much money did Cardi keep and how much did he turn over to the higher-ups; q. 18, Willie Messino; q. 19, Joe Gagliano; q. 36, was he paid by Messino; q. 37, was he paid by Gagliano; q. 41, did he meet with Gagliano at the Bar Nazionale; q. 42, Messino.

Sarno.

q. 6, Messino; q. 7, Messino and Gagliano; q. 11, is he still a juice collector for Messino and Gagliano; q. 13, 20, 21, Messino; q. 26, did he take orders from Messino, Gagliano; q. 27, 28, is he employed my Jack Cerone.

Group V—Background.

Cardi.

q. 3, has he ever been arrested; q. 4, was he arrested for kidnaping and assault; q. 5, was he a juice collector or an enforcer from 1963 to the present; q. 11, did he

make juice collections from over 100 persons from 1963 to 1966 in the City of Chicago; q. 48, 49, 50, 51, 52, does he know why Ray Finnerman left his home in Skokie and went to Texas; q. 39, what was his gainful occupation from January 1, 1963, to date.

Sarno.

q. 3, did he resign or was he discharged from the police department; q. 4, was he arrested by the F. B. I. for theft of interstate shipments; q. 5, was he arrested for kidnaping, assault and robbery of one Joseph Weisphal; q. 15, did he make certain threats to the mother of Mr. Black, thereby frightening her; q. 17, did wave a pistol under the face of Mr. Black; q. 21, was he present when Messino threatened Mr. James with a baseball bat; q. 31, did Greenbaum leave town to avoid making juice payments to him; q. 33, did Philip Marzarello leave the city to avoid making further juice payments; q. 40, what his lines of gainful employment were since he left the Chicago Police Department.

The Immunity Act grants immunity sufficient to supplant the privilege in those specific transactions recited in Group I, but it does not further supplant the privilege in that it does not prevent the state from using "links" or "fruits" of those transactions specifically named to prosecute for another offense, either for criminal usury or any act of violence connected with the collection of the juice loans.

While the location of the "centers of activities" listed in Group II may be "things," the state, nevertheless, could go to these things and find "links" or "fruits" necessary to prosecute petitioners for other acts of criminal usury or violence under the Illinois Criminal Code. The same applies to Group III except that acquaintances are not "transactions, matters or things." The persons named in Group IV are not "transactions, matters or things"—

they are citizens. Nevertheless, they are those persons best knowledgeable to furnish information necessary to prosecute petitioners for not only acts of criminal usury, but acts of violence associated with the collection of the usurious loans. Further, in the event that these persons gave anonymous information to the police department as to other crimes, after petitioners testified, petitioners would have no way of knowing whether or not this information was the "fruits" or "links" of their compelled testimony. Group V supports the fears of the petitioners. The statute sufficient to supplant the constitution must remove the sanctions that generate the fears justifying the invokation of the privilege, *Ullmann* v. *United States*, 350 U. S. 422.

The policies of the privilege reflect many of our fundamental values and our most noble aspirations, *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55. "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence," *Mapp* v. *Ohio*, 367 U. S. 656, 657, *Malloy* v. *Hogan*, 378 U. S. 1, 9. It would only be blinking at reality to find that in any subsequent prosecution petitioners would have the effective representation commanded by the Sixth Amendment—Illinois has no discovery rules in criminal cases. How then, in the event of subsequent prosecution, could petitioners, regardless of which party had the burden of proof, ascertain whether a subsequent prosecution was based on "links" or "fruits" of the compelled testimony, or even reply to the state's contention that the prosecution was based on "independent evidence." The Fifth Amendment is not "almost running into the Fourth Amendment," it is colliding head on with the Sixth Amendment.

Illinois has not as yet ruled on whether or not the state may prosecute on "independent evidence" after a person

has testified pursuant to the Immunity Act; and this question is still open in the United States Supreme Court, *Stevens* v. *Marks*, 383 U. S. 234, 244. In the absence of discovery provisions, regardless of who has the burden of proof, how is a citizen to determine whether or not the state is prosecuting on "independent evidence." To say that this matter could be determined at the trial level is not practical—it would only add to further "clogging" of the courts—endless continuances—a witness now refers to another witness as yet not subpoenaed. True, in any subsequent prosecution, petitioners would be entitled to a list of witnesses. However, their attorney or investigators, assuming that the petitioners could pay for the services of investigators, court reporters and attorneys, would themselves risk prosecution. Ill. Rev. Stat., Chapter 38, Section 32-4(b) provides that any party who, with intent to deter a party or witness from testifying, directly or indirectly, conveys to such witness any knowingly false information, is subject to a penalty up to one to three years in the penitentiary.

Further, the Immunity Act omits the phrase "or subjected to penalty or forfeitures." This provision is in the following six immunity statutes in 1967 Ill. Rev. Stat.: Chapter 5, Section 158, Marketing Fresh Fruits and Vegetables; Chapter 48, Section 501, On Employment Compensation; Chapter 67½, Section 173, State Housing Act; Chapter 67½, Section 278, Neighborhood Redevelopment Corp. Act; Chapter 100½, Section 4, Public Nuisance (Prostitution); and Chapter 111⅔, Section 65, Public Utilities. There can be no question that if petitioners had engaged in criminal usury or had used violence with reference to collecting loans, they would be subject to judgments, including punitive damages, in a civil suit where "malice is the gist of the action." Failure to pay these judgments

would subject petitioners to serve a period of six months in the County Jail pursuant to 1963 Ill. Rev. Stat., Chapter 77. Section 68. "The Illinois Insolvent Debtor Statutes, Ill. Rev. Stat., Chapter 77, Sections 4, 5, 68 (1963), in effect, permit the imprisonment of a judgment debtor if the judgment debt is the result of a civil action in which malice is the gist of the action," *Nichimen Co., Inc.* v. *Ashbach*, 352 Fed. 2d 899, 904 (C. A. 7th Circuit, 1965), and discharge under the Insolvent Debtors Act, Chapter 72, cannot be invoked, *White* v. *Youngblood*, 367 Ill. 633, 635 (1938). It is not claimed that the privilege embraces exposure to civil suits or punitive damages. It is contended that when a person may be committed to the penitentiary for a period of six months, for each one of a great many judgments, then the consequences of the compelled testimony are necessarily penal in character—his liberty is at stake.

The failure of Illinois to enact discovery procedures in criminal matters, when considered in connection with the vague provisions of the Immunity Act, does not comply with the federal standard of "fundamental fairness." Further, the examinations of the petitioners and the procedure followed by the state, following their sentence, do not comply with the federal standard of "fundamental fairness." There can be little doubt that the Commission, having some information from records previously seized and which were suppressed in the criminal court, sought to examine the petitioners with reference to any other suspected or unsuspected crimes, reminiscent of the procedure in the Star Chamber Sessions. Further, oral argument on the appeal to the Illinois Supreme Court was set for November 26, 1969. On November 10, 1969, each of the petitioners received another subpoena to testify before the Commission. They appeared and refused to testify. On January 5, 1970, the Commission filed another complaint before

the same trial judge in Case No. 70 L 61, in which the Commission recited that the petitioners had received summons on November 10, 1969, and refused to testify. The complaint further recited that petitioners' request for an injunction was denied on November 25, 1969, and further requested that petitioners be ordered to appear on January 10, 1970. (The Illinois Supreme Court's decision was filed on May 27, 1970.) The trial court, on January 12, 1970, entered an order directing the Commission to produce a copy of all records seized from the home of Cardi that were subsequently suppressed in the criminal court, within fourteen days, at the office of the attorney for petitioners. The Commission has to this day refused to comply with this order; no other action was taken by either side; and case No. 70 L 61 is still pending. The "rack and screw?"

Petitioners had some insight as to what was to follow in the original case, 66 L 1111 (A. 23, 24). The court ordered the petitioners to appear before the Commission a second time. The Commission prepared an order for the judge's signature authorizing the Commission to examine petitioners "but not limited to the questions previously propounded." The court correctly struck the phrase "including, but not limited to." (A. 23, 24.)

The implications of the questions, in the setting in which they were asked, demonstrated to an overwhelming degree that the questions might be dangerous because injurious disclosure could result in future state prosecution.

II.

MUST THE STATE AFFIRMATIVELY DEMONSTRATE TO RESPONDENTS, WHEN TESTIFYING PURSUANT TO THE ILLINOIS STATUTE, THAT AN IMMUNITY, AS BROAD IN SCOPE AS THE FIFTH AMENDMENT, IS AVAILABLE AND APPLICABLE TO THEM?

"The basic purposes that lie behind the privilege against self-incrimination do not relate to . . . but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load,' " *Tehan* v. *Shott*, 382 U. S. 406, 415—it is an expression of the moral striving of the community, *Malloy* v. *Hogan*, 378, U. S. 1, 9.

Where an immunity act (1) on its face is not sufficient to supplant the privilege (it does not prevent the use of "links" or "fruits" of the compelled testimony), and at the time of the compelled testimony Illinois had not interpreted the Immunity Act as being sufficient to supplant the privilege; (2) in a situation where a Grand Jury Act provides that a person shall not be prosecuted *for any offense* shown in *whole or in part* by such testimony, and such provisions have been held adequate to eliminate the privilege, *People* v. *Walker*, 28 Ill. 2d 585, 590 (1963), the legislature then amends an Immunity Act, about two years after the *Walker* case, but does not amend that part of the Immunity Act which provides "a person shall not be prosecuted for any transaction, matter or thing concerning which he gave answer;" (3) and the Illinois Constitution and Illinois Case Law are construed alike with the Fifth Amendment and the Federal Case Law applicable thereto, but Illinois, although considering Federal Case Law, will not construe an Immunity Act solely for the purpose of abridging the privilege, *People* v. *Newmark*, 312 Ill. 625, 632, and follows Federal Case Law to the effect that legislation cannot abridge the privilege, but the Immunity Act

itself must be so broad as to have the same scope and effect, *People* v. *Boyle*, 312 Ill. 586, 597 (1924); (4) in a state where the failure to provide adequate discovery procedures in criminal matters does not comply with the federal standards of "fundamental fairness" so that a citizen is unable to ascertain whether or not in any subsequent prosecution the "links" or "fruits" of the compelled testimony are the basis for a subsequent prosecution; (5) where a state has not as yet ruled upon whether or not the state may nevertheless use independent evidence in a subsequent prosecution, and from the implications of the questions it is clear that a state could sincerely believe that it was proceeding in a subsequent prosecution on independent evidence (anonymous information following the compelled testimony), and yet, in truth, be proceeding on the "links" and "fruits" of the compelled testimony, that a person would be in no position to controvert; and (6) in a state where a person may be confined to jail for six months for failure to pay a civil judgment where "malice is the gist of the action" and the Immunity Act does not contain the phrase "or subjected to penalty or forfeiture," although six other Illinois statutes do contain this latter phrase, then Illinois must affirmatively demonstrate to a person that an immunity as broad in scope as the Fifth Amendment is available and applicable to them, *Stevens* v. *Marks*, 383 U. S. 234, 246.

CONCLUSION.

It is hereby submitted that for the reasons advanced, the decision of the Illinois Supreme Court be reversed.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions.

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE II SECTION 10, ILLINOIS STATE CONSTITUTION:

No person shall be compelled in a criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

1967 ILL. REV. STAT., CHAPTER 38:

Referred to as the Immunity Act.

203-1. Legislative intent.] § 1. It is the intent of the General Assembly, recognizing the frequent subversion of governmental, political and economic institutions through the influence of organized crime, (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace, public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State, and the degree of efficiency of law

enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State.

This Act, and the jurisdiction of the Commission created thereby, is not intended to be in derogation of the jurisdiction of any Grand Jury of any County of the State.

203-10. Organized or syndicate crimes.] § 10. The Commission has power to investigate all fields of organized or syndicate crime, including, but without limiting the generality thereof, prostitution, narcotics, liquor, gambling, subversive activities, lotteries, counterfeiting and tax frauds.

203-14. Refusal to answer or produce evidence—Order of court—Immunity.] § 14. In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, *that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer* or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to

testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States. As amended by act approved Aug. 24, 1965. L. 1965, p. 3459.

1967 Ill. Rev. Stat. Chapter 38:

Referred to as the Grand Jury Act.

§ 106-1. **Granting of Immunity.)** In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.

§ 106-2. **Effect of Immunity.)** Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.

1965 Ill. Rev. Stat. Chapter 38:

Criminal Usury.

39-1. § 37-1. **Criminal Usury.)** Any person commits criminal usury when, in exchange for either a loan of money or other property or forbearance from the collection of such a loan, he knowingly contracts for or receives from an individual, directly or indirectly, interest, discount or other consideration at a rate greater than 20% per annum either before or after the maturity of the loan. Added by act approved Aug. 10, 1965. L. 1965, p. ....., H. B. No. 149.

39-2. § 37-2. **Penalty.)** A person convicted of criminal usury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned. Added by act approved Aug. 10, 1965. L. 1965, p. ....., H. B. No. 149.

1967, ILL. REV. STAT. CHAPTER 77:

Malice Gist of Action Statutes.

4. Execution.] § 4. The person in whose favor any judgment, as aforesaid, may be obtained, may have execution thereon in the usual form, directed to the proper officer of any county, in this state, against the lands and tenements, goods and chattels of the person against whom the same is obtained, or against his body, when the same is authorized by law. Upon the filing in the office of the clerk of any court in any county in this state of a transcript of a judgment rendered in any other county of this state, execution may issue thereon in said county, in like manner as in the county where originally obtained. As amended by act approved July 9, 1963. L. 1963, p. 2678. Effective Jan. 1, 1964.

[§ 2. This Act shall take effect on January 1, 1964, but only as to judgments rendered after December 31, 1963.]

5. Execution against body.] § 5. No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors. [As amended by act approved July 11, 1935. L. 1935, p. 937.]

68. Arrest—Summary hearing—Order—Continuance—Notice—Maximum period of imprisonment—Schedule.] § 65. When a debtor is arrested by virtue of an execution against his body, he shall be immediately taken before the court out of which the execution issued. The court shall proceed in a summary manner to hear the evidence, if any, as to whether the execution against the body should have been issued. If upon such hearing the court finds that the body execution was not properly issued under the provisions of this

Act it shall order that the body execution be quashed and that the judgment debtor be discharged from custody; but such discharge shall not affect the right of the judgment creditor to collect the judgment otherwise than by execution against the body of the judgment debtor. If, in a case where the body execution was issued under the provisions of Section 62,[1] the court finds that the allegations of the affidavit required by that Section have been proved or if, in a case where the judgment was obtained for a tort and there was a special finding that malice was the gist of such action as required by Section 5 of this Act,[2] the court finds that the body execution was properly issued in such case, it shall order that the judgment debtor be conveyed to the county jail and kept in safe custody until he shall satisfy the judgment or be discharged according to law. The court may continue such hearing from time to time and in such case it shall either remand the judgment debtor into the custody of the sheriff or other officer of the court or allow him to give bond for his appearance from time to time until the proceedings are concluded, such bond to be in such sum and with such security as the court directs.

Immediately upon the arrest of the defendant the officer making the same shall give notice thereof and of the time and place where the judgment debtor will be brought before the court to the plaintiff, his agent or attorney.

No person imprisoned under the provisions of this act shall be imprisoned for a longer period than six months. Provided, however, that no person shall be released from imprisonment under this act who neglects or refuses to schedule in manner and form as provided by "An Act concerning insolvent debtors", approved April 10, 1872, as amended.[3] As amended by act approved May 6, 1957. L. 1957, p. 151.

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1. Section 65 of this chapter.
2. Section 5 of this chapter.
3. Chapter 72.

Miscellaneous Statutes.

1967 ILL. REV. STAT.:

Marketing Fresh Fruits and Vegetables Act

Chapter 5 § 158. **Exemption from prosecution based on testimony given.]** § 20. No person shall be excused from attending, testifying, answering any lawful inquiry or producing any documentary evidence before the Director or any employee of the Department designated by the Director in obedience to a subpoena of the Director or any such designated employee in any cause or proceeding based upon or growing out of any alleged violation of this Act upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forefeiture. By[1] no natural person shall be prosecuted *or subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he is compelled, under oath, to testify or produce evidence, documentary or otherwise, before the Director or such designated employee in obedience to the subpoena of the Director or any such designated employee in such cause or proceeding; provided that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Unemployment Compensation Act

Chapter 48 § 501. § 1001. **Testimony—Immunity.** No person shall be excused from testifying or from producing any papers, books, accounts, or documents in any investigation or inquiry or upon any hearing, when ordered to do so by the Director, Board of Review, or member thereof, or any deputy, Referee, or a representative of the Director, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or*

1. Probably should read "But".

subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before any such person or Board of Review: Provided, that such immunity shall extend only to a natural person, who, in obedience to a subpoena, and after claiming his privilege, shall, upon order, give testimony under oath or produce evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

State Housing Act

Chapter 67½ § 173. **Testimony of witnesses.]** § 23. No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered by the board when ordered to do so by the board or by any member, officer, or employee of the Board, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or subjected to any penalty or forfeiture,* for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the board or a member, officer or employee thereof; provided that such immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath or produces evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Neighborhood Redevelopment Corp. Act

Chapter 67½ § 278. § 28. **Testimony—Immunity.)** No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered or held by the Redevelopment Commission, when ordered to do so, upon the ground that the testi-

mony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Redevelopment Commission; Provided, that such immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath or produces evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Public Nuisance (Prostitution) Act

Chapter 100¼ § 4. **Plaintiff may file interrogatories —Failure to answer—Answer as evidence.]** § 4. The plaintiff at any time before, but not later than ten days after the filing of the answer, unless further time be granted by the court, may file interrogatories in writing concerning matters material to the allegations of the complaint or respecting the ownership of the property upon which it is claimed the nuisance is maintained. A full answer to each interrogatory under the oath of the defendant shall be filed with the clerk within ten days after a copy of the interrogatories has been served upon him or his solicitor. For a failure to so answer interrogatories the court may strike the answer to the complaint from the files and enter default and a decree pro confesso, and a rule to answer interrogatories may be entered and the court may punish a defendant for contempt of court for a refusal to obey such rule. No person shall be excused from answering interrogatories under oath on the ground that an answer may tend to criminate him or subject him to a penalty or forfeiture. The answer shall be evidence against, but not on behalf of, the defendant; it shall not be used against him in any criminal proceeding nor shall he be prosecuted *or subjected to a penalty or forfeiture* for or on account of any transaction, matter or thing disclosed by him in such answer responsive to the interrogatories.

Public Utilities Act

Chapter 111⅔ § 65. **Testimony—Immunity.]** § 61. No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered by the Commission, when ordered to do so by the Commission or any commissioner, assistant commissioner, or officer of the Commission, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Commission or a commissioner, assistant commissioner, or an officer of the Commission: Provided, that such immunity shall extend only to a natural person, who in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.